1981

Brett W. Nelson v. Jeff Jacobsen : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

BRETT W. NELSON,	:	
	:	
Plaintiff and Respondent,	:	
	:	
vs.	:	Case No. 17,667
	:	
JEFF JACOBSEN,	:	
	:	
Defendant and Appellant.	:	

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Sixth Judicial District Court for Sanpete County
Honorable Don V. Tibbs, Judge

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IN THE SUPREME COURT

OF THE STATE OF UTAH

BRETT W. NELSON,

Plaintiff and
Respondent,

Case No. 17,667

vs.

JEFF JACOBSEN,

Defendant and
Appellant.

BRIEF OF RESPONDENT

NATURE OF THE CASE

Plaintiff brought this action at law to recover money damages against defendant for alienating the affections of his former wife.

DISPOSITION IN THE LOWER COURT

The matter was tried to the Court, Honorable Don V. Tibbs, District Judge, on January 21, 1981. Defendant was not represented by counsel at trial. The trial resulted in a judgment against defendant totalling $84,600.00. Thereafter, defendant retained counsel and moved for a new trial and for judgment n.o.v., both of which motions were denied. Defendant then filed

this appeal.

STATEMENT OF FACTS

The Plaintiff and Brenda Nelson (now Jacobsen) were married July 15, 1978. (Tr. 18). At the time in question the Plaintiff was 21 years of age (Tr. 21), and Brenda was age 18 (Tr. 20).

In October of the same year, Plaintiff and his wife became acquainted with the Defendant who had been previously married, but was now divorced, and who, at age 31, was somewhat older than the Plaintiff and Brenda (defendant's deposition, pages 3-6).

The first untoward contact between the Defendant and Plaintiff's wife occurred some few months later on New Year's Eve, 1978, at a party held at Defendant's residence, at which time Defendant claimed that Plaintiff's wife approached him and said she wanted to go to bed with him (defendant's deposition p. 9).[1]

The Defendant's next contact with Plaintiff's wife was approximately one week later at the Defendant's house at approximately 1 o'clock in the morning. The contact lasted for about an hour and a half (defendant's deposition, page 10).

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[1] At trial Defendant initially denied this contact, but after being shown his sworn testimony in the deposition, he acknowledged its accuracy. Because of such denials and inconsistencies with his former testimony, the Court ordered publication of the Defendant's deposition, and it is now before the Court (Tr. 71). It should further be noted that Plaintiff's former wife, Brenda, denied the incident, though at the time of trial she was married to Defendant, their marriage having been contracted on October 1, 1980 (Tr. 76).

Defendant testified in his deposition of several late-night meetings at his home with plaintiff's ex-wife:

> Q. Was the next contact after that when you [meaning defendant and plaintiff's ex-wife] were alone?
> A. Probably my house again.
> Q. Night?
> A. I don't know. It depends on probably what hours Brett was working, I would imagine.
> (deposition p. 14 lines 20 - 25)
> Q. Most of them [meetings between defendant and Brenda] would have been --
> A. In the hour and a half bracket, you are right.
> Q. And around the midnight area and 1:00 o'clock?
> A. I say fifty fifty, you know, it was either noon or midnight, one of the two.
> Q. Depending on when he was working?
> A. Yes.
> (defendant's deposition p. 15 lines 15 - 25)
> (Emphasis added.)

Defendant then went on to testify that there had been approximately twenty of these types of visits, plus two times he had gone to Brenda's house, plus some rides around town in her truck. (defendant's deposition p. 18).

Plaintiff first learned of the contacts between his wife and the Defendant during the early part of June of 1979, when after sustaining an injury at the coal mine, he came home early from work, and found his wife and the Defendant sitting on a porch outside of his residence. The time was between 11:30 and

12:30 at night. (Tr. 19 and 20). Plaintiff was not sure what was going on, and after being assured by his wife that there was nothing, he "let the matter slide" (Tr. 20). Shortly thereafter, Plaintiff again came home early from work and found his wife not home. Sometime later Plaintiff's wife arrived with the Defendant, who had taken her to one of the nearby mountain canyons. (Tr. 21). The incident resulted in a family session, involving the Plaintiff, his wife Brenda, and both of their parents. (Tr. 21). Brenda, now Mrs. Jacobsen, denied that the subject of her seeing Mr. Jacobsen, the Defendant, was discussed at all. (Tr. 103). However, even Brenda's father, who was called by the Defendant as a witness, testified on cross-examination that that was the subject of the conversation. (Tr. 118).

These two incidents in June brought matters to a head and Plaintiff's father contacted Defendant and requested that he leave Brenda alone to see if they couldn't make their marriage work. (Tr. 53). Defendant acknowledged that plaintiff's father contacted him on two occasions requesting that he leave Brenda alone (defendant's depostion p. 32 line 34 and Tr. 77). Defendant advised plaintiff's father as follows: "I'll pick my friends, thank you" (defendant's deposition p. 34 lines 21-22). Regarding a conversation with Brenda's father (Ferrell Wynn), concerning the same subject, defendant testified:

> Q. (by Mr. McIff): Did you ever tell him that you would never quit seeing her?
>
> A. At one conversation I believe something was mentioned that if -- I can't remember how it went exactly, something about and I said, "I'll be Brenda's friend as long as she wants me to be her friend. I'll be it," and that's about the way that went down. (Defendant's deposition, page 29 lines 5-12).

During the weeks that followed, defendant continued to see plaintiff's wife, and in August took her to Las Vegas on an overnight trip (defendant's deposition page 19, Tr. 23 and 77). The trip had been arranged in a late night/early morning phone call between defendant and plaintiff's wife, which was interrupted when plaintiff came home sometime after midnight (Tr. 23 and 24). Defendant asserted that plaintiff had consented to this trip (Tr. 13). Plaintiff described his consent as follows:

> A. I actually never consented, came out and gave my full consent that it was O.K. for her to go because actually in my mind, it wasn't O.K. for her to go but she would have went whether I said yes or no. (Tr. 24 lines 29-30 to Tr. 25 lines 1-2).
>
> . . .
>
> A. I consented in the idea that it would, more or less, help us out because she said she wanted to go to Vegas so she could get her head on straight and trying to straighten herself out, so we might be able to get back together. (Tr. page 26 lines 24-28).

. . .

A. I told her I wished she wouldn't, but if that is what she had to do, that was her will.[2]

Although defendant claims to have done nothing improper, he did not ask plaintiff's permission nor did he give plaintiff notice of the trip (defendant's deposition page 20 line 21). At first, defendant testified that plaintiff's wife got her own room (defendant's deposition page 20), but later acknowledged that he handled the registration under his own name (defendant's deposition page 22). With regard to what happened in the room, defendant testified:

> I just opened the door, walked in and looked around and saw that everything was cool for her, she went in to bed and I went back to gambling (defendant's deposition page 23 lines 16-18).

Plaintiff's ex-wife had ostensibly gone to Las Vegas to be alone and to consider her problems, yet it appears from defendant's testimony that she was gambling with him and apparently intended to continue doing that until her luck

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[2] Plaintiff's consent, if it may be called such, must be gauged in light of the fact that Defendant was his "friend" and had actually undertaken to counsel him regarding his marital affairs (Tr. 14). In addition, the age difference between Plaintiff (21), and his wife (18), and the Defendant (31) may have had the impact of disarming Plaintiff and causing him to place trust where it was not properly lodged. His limited exposure and experience may have made him a poor match for Defendant in a contest for his wife's affections.

changed and she won sufficient money to pay for the motel room (defendant's deposition page 25). Defendant's testimony about the motel was elusive. He testified that he had no receipts, no evidence of any kind that would indicate what the motel was, that he didn't known where it was, how big it was, or anything about it, and that he "couldn't find it in a million years" (defendant's deposition page 26).

Shortly after the Vegas trip, the subject of the defendant's involvement arose in a conversation between plaintiff and his ex-wife. Plaintiff wanted "to find out exactly what kind of relationship they actually had together" (Tr. 27 lines 10-11). Concerning this conversation plaintiff testified:

> A. That's when she told me not to ask her anything that I didn't want to hear and I asked her how many times she'd been with him, how much involvement and activity she actually had with him, sexually [sic] involvement. I asked her about that and I finally got her down to ten or twelve times (Tr. page 27 lines 16-21).

The foregoing disclosure triggered a confrontation between plaintiff and his wife, which resulted in her requesting that she be taken to the defendant's house. Plaintiff declined and so his wife went to defendant's on her own (Tr. 27).

Following the June discovery by plaintiff of his ex-wife's involvement with the defendant, his life changed markedly. According to plaintiff's father, his alcohol problem quadrupled (Tr. 58). Where he had had stable employment before (Tr. 54), he went through four employers in a relatively short period of time (Tr. 30). His income between June of 1978 and the trial in January of 1980 was only half of what is was before (Tr. 31). Termination of his theretofore productive employment came in July following the June discovery, and was directly related thereto (Tr. 25 and 61). His income before had been $2,500.00 per month (Tr. 25). The court awarded plaintiff $600.00 per month for sixteen months following the alienation (Tr. 129).

July, August and September were rocky months for the Nelson marriage. During this period of time, plaintiff's ex-wife stayed with defendant at his home on more than one occasion. During one such visit, her girlfriend Linda Springer (who also appeared as a witness), brought her some clothing (Tr. 109 and 122). The Vegas trip took place during this period of time.

In September, plaintiff filed an action for divorce and also filed the instant action, claiming that the defendant had alienated the affections of his wife. Around the end of October the parties had a fight, after which the plaintiff's ex-wife went to the defendant's house and thence to her parents and did not

return. Plaintiff and his ex-wife each described his or her role in the fight as being a defensive one. Plaintiff testified:

> A. She attacked me and I tried to push her away. She'd just keep coming back. I slapped her with the palm of my hand.
> Q. (by Mr. Jacobsen) You slapped her; is that righ?
> A. Yes, I did.
> Q. Did you push her against the wall?
> A. I pushed her to try to keep her away from me, yes (Tr. 46 lines 17-24).

Plaintiff's ex-wife described her role as follows:

> Q. (by Mr. McIff) Do you acknowledge tht you kicked Brett and you scratched and you bit him and fully participated in that?
> A. Yes, I am. I know I scratched him and I kicked him, but that was my only defense that I had against him. He's ten times stronger than I am and I am aware that I did that, but I did not bite him. I don't remember biting him, but I did scratch him, yes, I did (Tr. 110 lines 21-28).

A decree of divorce was filed between the Nelsons on November 1, 1979, and became final three months thereafter. The decree notwithstanding, plaintiff continued to feel affection for his wife, and continued to explore with her the possibility of reconciliation before expiration of the interlocutory period and remarriage thereafter. That continued until approximately one

week before plaintiff's ex-wife became the wife of the defendant (Tr. 30). Plaintiff's ex-wife acknowledged this overture from plaintiff approximately a week before her marriage to the defendant (Tr. 112).

The alienation of affection matter came before the court in January, March, May and July of 1980 (Tr. 144). The proceedings had gone through the point of pretrial, during all of which time defendant was represented by counsel.

During the summer of 1980 plaintiff and defendant reached a settlement agreement in the instant matter, and the settlement documents, including a motion and order of dismissal and a promissory note, were forwarded to defendant's counsel. The stipulated order of dismissal was executed August 9, 1980 and filed August 12, 1980. However, defendant's counsel failed to obtain execution of the promissory note by his client, thereby nullifying the settlement. (R. 15).

After having succeeded in obtaining a dismissal of the alienation of affection suit, and before any effort to reinstate the action had been made, defendant, on October 1, 1980, in Las Vegas, Nevada, married plaintiff's ex-wife, Brenda Nelson (Tr. 76).

On December 26, 1980, and in order to revive the case, plaintiff filed a motion to reinstate the action and set it for

trial. (R. 14). The motion was noticed for January 7, 1981, and copies of all proceedings were mailed to defendant. (R. 19).

The motions were called up for hearing by the Court on January 7, 1981. Defendant was present in the courtroom when the Court ordered the reinstatement and set the matter for trial on January 21, 1981. (R. 20 and 64).

The Court's order of reinstatement and order setting the matter for trial were reduced to writing on January 14, 1981 and copies thereof were mailed to defendant on January 15, 1981. (R. 14 and 15). In addition, the Court's executive clerk sent notice of the trial date to defendant, and called him personally on the telephone advising him that the trial was going forward, that he should retain an attorney, and that plaintiff was represented by an attorney. (R. 64). Defendant replied that he intended to represent himself. (R. 64).

Defendant appeared at the time and place set for trial. After an inquiry by the Court, he indicated his readiness and willingness to proceed pro se. (Tr. 6 and 7).

The trial proceeded. Defendant cross-examined plaintiff's witnesses, called and examined his own witnesses, testified personally, and argued his case. The Court found the evidence against him and entered judgment.

Defendant retained new counsel and moved the Court for a new trial and for judment n.o.v., both of which motions were denied. Defendant filed objections to the Court's order denying the motions. All of defendant's objections were disallowed except one, and the Court modified its order accordingly. Defendant then filed this appeal.

ARGUMENT

POINT I: AN ACTION AT LAW FOR ALIENATION OF AFFECTIONS IS VIABLE UNDER THE COMMON LAW OF THIS STATE AND SHOULD NOT BE ABOLISHED.

Defendant's assertion that the State of Utah no longer recognizes the tort of alienation of affections is simply without foundation in legal precedent. To the contrary, Utah clearly appears to be one state which continues to recognize this tort.

The Utah Court has recognized the right to recover for alienation of affection, Wilson v. Oldroyd, 1 Utah 2d 362, 267 P2d 759 (Utah 1954) and for criminal conversation, Cahoon v. Pelton, 9 Utah 2d 224, 342 P2d 94 (Utah 1959).

A useful discussion of the topic appears in an article in the Utah Bar Journal, in which the author states:

Considering the emphasis that has been placed

> on marriage in Utah by political and religious leaders, there have been surprisingly few actions brought to seek redress for loss of consortium occasioned by an interference with the marital relationship.
>
> But our society encourages marriage and regulates it -- should it not also come to the aid of the marriage partners when the relationship is soured by the interference of a third party? "Tortious Interference with Marital Relations in Utah", 5 Utah Bar Journal 75 (Fall/Winter 1977 Edition).

Defendant's brief quotes at length from a North Dakota Law Review article which is replete with assumptions, conclusions, and reasoning which the undersigned considers to be fundamentally in error and grossly deficient in respect of the importance of the marriage contract, the rights of the respective parties therein, and the entitlement of marital parties to be free from intentional interference by third persons.

Obviously the authorities are split. Appellant has quoted accurately from many jurisdictions which support his position. In the final analysis the issue may rest on the deference due established Utah precedent and the marital philosophy ingrained in our society. As perceived by the undersigned, that philosophy is as follows:

> Reason and experience demonstrate that a

> marriage involving a husband and wife as partners secures to each not only material services, but love, felicity, companionship, the exchange of ideas, consultation with respect to the family welfare and the rearing of children, and the maintenance of an intimacy abounding in reciprocal acts of kindness. Albert v. McGrath, 278 F.2d 16, 18, (D.C. Cir. 1960).

Our society could not insure that all marriages enjoy perfect harmony, for that is rarely, if ever possible, and is not the business of the state to enforce. The marriage, however, should be protected from interference by third parties, so that the marriage partners have the opportunity to work toward a state of harmony that will secure to each the substantial benefits thereof. The action need not be based on the anachronism that the wife is the husband's chattel but rather on the fact that the marriage secures to each certain substantial benefits worthy of protection from intentional interference from third persons. The benefits to be derived from marriage as well as the damage which can be inflicted by an interloper have not appreciably changed since Wilson v. Oldroyd, supra, and the interest of the law in protecting the marriage remains as valid as ever.

Recovery is allowed even though the offending spouse willingly participates in the defendant's proscribed conduct, and even if there has been enticement of defendant by the offending spouse. Wilson v. Oldroyd, supra, 267 P2d at 763. In this case,

the evidence shows that Brenda Nelson (the offending spouse) willingly participated with defendant. Even if she had enticed him, recovery would still be proper.

Punitive damages can be awarded only where there is a finding of malice. Evidence that defendant continued to pursue plaintiff's wife after being warned to desist supports a finding of wilfull and wanton disregard of plaintiff's rights so as to justify an award of punitive damages. Wilson v. Oldroyd, supra, 267 P2d at 764.

POINT II: THE FINDINGS AND JUDGMENT OF THE TRIAL COURT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The applicable rule of judicial review in this kind of case was set forth by Justice Crockett in the frequently cited case of Charlton vs. Hackett, 11 U2d 389, 360 P2d 176 (1961), in which the court stated:

> In considering the attack on the findings and judgment of the trial court it is our duty to follow these cardinal rules or review: to indulge them a presumption of validity and correctness; to require the appellant to sustain a burden of showing error; to review the record in the light most favorable to them; and not to disturb them if they find substantial support in the evidence.

As one might expect, the testimony in the trial was full of contradictions. The defendant and his new wife sought to fix the blame for marital difficulties on the plaintiff, and described their pre-existing relationship as being "platonic". In fact, "platonic" became the most over-used word in the trial, as defendant, his new wife, and her girlfriend all described the developing relationship between defendant and plaintiff's ex-wife by use of this term. The court could well have concluded that the defendant had "coached" the testimony.

An effort was made to blame the problem on plaintiff's use of alcohol, but plaintiff's ex-wife acknowledged that she also used alcohol, and the evidence revealed that plaintiff's use was four times worse following the June discovery of the problem between his wife and the defendant. The serious confrontations and problems of which all testified, for the most part arose following the June discovery. With respect to the impact this had on the plaintiff, his ex-wife's father testified as follows:

> Q. (by Mr. McIff) All the problems with her leaving and coming and going and his employment and all those things happened after you were made aware of Mr. Jacobsen's involvement?
> A. Yes (Tr. 119 lines 8-12).

Perhaps the most that can be said in response to appellant's questioning the sufficiency of the evidence is that the trial judge was there and listened to all the witnesses. He observed the defendant and his new wife attempt to characterize their relationship, the midnight meetings and the Vegas trip as being "platonic". He listened to the plaintiff, his parents, his ex-wife's father, and Brenda's girlfriend, and concluded that the relationship was much more than defendant acknowledged and that it was intentional and resulted in the alienation of the affections of plaintiff's wife. In his deposition, defendant had indicated that any kisses between him and plaintiff's wife would not have been "passionate" (defendant's deposition page 19). The judge concluded otherwise, and did so with the advantage of having all of the parties before him.

Appellant has suggested the adoption of what he refers to as the Kansas standard (see Long v. Fischer, 210 Kansas 21, 499 P2d 1063 (1972)). That case imposes an impossible burden, since the only two persons who could really establish the required ingredients would be the interloper and the estranged spouse (in this case, the defendant and his new wife).

Under the Kansas standard, the more successful the alienation, the more impossible the burden on the party who has lost his spouse. If the interloper has been successful to the

point of total alienation and marriage of plaintiff's wife, he will have successfully defeated any opportunity to show that the estranged wife was not a willing participant, as the Kansas standard would require. This standard would constitute almost a total departure from that set forth by this court in Wilson v. Oldroyd, supra.

The findings and judgment of the trial court find substantial support in the record when such is viewed in the light most favorable to those findings and judgment.

POINT III: THE TRIAL COURT HEARD THE EVIDENCE AND ENTERED JUDGMENT THEREON; UNLESS THE AWARD WAS BASED ON PASSION OR PREJUDICE. THE MATTER SHOULD NOT BE REVIEWED, REVERSED OR MODIFIED ON APPEAL.

It is interesting to note that the lower court awards of compensatory and punitive damages in Wilson v. Oldroyd, supra, although set by a jury, were identical to the awards made by the trial judge in this case. In the Wilson case the Court said:

> If the [award] . . . is so grossly excessive that it must have been inspired by passion or prejudice, or by spite, envy, ill will or corruption, as contrasted with reason and justice, the [award] cannot be permitted to stand. 267 P2d at 764.

The only statement by the trial court which approximates passion is at Tr. 124 lines 2 to 17, where Judge Tibbs, in announcing his judgment, said:

> The Court finds that marriage and family -- that marriage is a sacred institution and that anyone who interferes with that should suffer the full consequences of the law and I'm just telling you, Mr. Jacobsen, at this time that this Court nearly every week is having criminal trials where people steal money from other people and in my opinion you've stolen something far more than money, you have interfered with the whole basis fabric of society and, when you tell me it's a plutonic relationship, I say it's nonsense. I don't buy it at all and I don't want you to think I do. I don't know how they're going to collect any money judgments that I give against you but they're certainly going to get one against you and I hope this gets well publicized because I'd like everyone to know that if a case like this comes into my Court, that they can expect to suffer; . . . .

The unambigous import of Judge Tibbs' comments do show a passionate regard for the importance of marriage and family life in our society. There is no indication of prejudice, spite, envy, ill will or corruption toward this defendant, except that he was the cause of the ruin of a marriage.

In regard to the dollar amount of the award, our Court has said:

> The jury [in this case, the judge] is allowed great latitude in assessing damages for personal injuries. . . . The present cost of living and the dimished purchasing power of the dollar may be taken into consideration when estimating damages.
>
> . . . (T)he mere fact that it [the verdict] was more than another jury, or more than this court, might have given, or even more than the evidence justified, does not conclusively show that it was the result of passion, prejudice or corruption. Pauly v. McCarthy, 109 Utah 431, 184 P2d 123, 127 (1947).

The Wilson court allowed the award for compensatory damages to stand, but reduced the punitive damages award from $25,000.00 to $5,000.00. In light of Chief Justice Wolfe's comments in Pauly v. McCarthy, supra, regarding the dimished purchasing power of the dollar, it seems particularly appropriate that the damage awards in this case be affirmed.

> POINT IV: THE RECORD SHOWS THAT DEFENDANT VOLUNTARILY AND ADEQUATELY REPRESENTED HIMSELF AT TRIAL; THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO ALLOW A NEW TRIAL.

Defendant claims that a new trial should be granted for two reasons. He claims first that he was not afforded timely notice and a reasonable opportunity to be heard, and, second, that the pretrial procedure was fundamentally unfair.

Defendant's position is premised on the faulty allegation that he first learned on January 19, 1981 of the trial scheduled for January 21, 1981, and that he had no opportunity to obtain other counsel.

The facts are that Defendant knew from mid-summer, 1980 that he had reneged on the settlement agreement reached, and that the lawsuit had been dismissed in reliance on that agreement. In the face of that, defendant did nothing, seeking thereby to take advantage of a dismissal premised on what amounted to a fraud.

Thereafter, the first order of business was to get the case reinstated and set down for trial. Plaintiff's right to acheive that result is not open to question. The reinstatement occurred on January 7, 1981, two weeks prior to trial and in the presence of and with the full knowledge of defendant.

Defendant asserts that plaintiff should have sent notice to defendant to obtain counsel or proceed without counsel pursuant to the requirements of Sec. 78-51-36, Utah Code Annotated, 1953, which provides that such notice is required when "an attorney dies or is removed or suspended, or ceases to act as such."

Defendant's attorney did not die, nor was he removed or suspended, leaving only the question as to the meaning of the phrase "ceases to act as such."

The phrase in question was defined in the early Utah case Van Cott et al. v. Wall, 53 Utah 282, 178 Pac. 42 (Utah 1918), in which the Court, quoting a Michigan case, held as follows:

> We do not understand this to apply to a case where a practicing attorney for any reason declines to go on with a particular case while still continuing in practice. It might be made the means of serious mischief if it could have such a construction. The plain meaning of the statute is to provide for cases in which the attorney or solicitor, by reason of death, disability, or other cause, has ceased to practice in the court. His refusal to proceed in a particular case is not ceasing to "act as such" attorney or solicitor; it does not even disconnect him with the case; for that can only be accomplished by consent of the parties or of the court, or by regular proceedings for substitution of another. (Emphasis added.)

The Supreme Court reached an identical result in the case Security Adjustment Bureau, Inc. v. West, 20 Utah 2d 292, 437 P2d 214 (Utah 1968), in which the Court said:

> West urges that the court erred in not setting aside the default judgment because Security did not demand that West get new counsel when his attorney withdrew. This, under Sec. 78-51-36, Utah Code Annotated 1953. This urgence is not well taken since there is nothing in the record to indicate that West withdrawing counsel died, was removed or suspended from the practice of

law. The case of Van Cott v. Wall seems to be controlling here.

Defendant has cited the more recent decision of Utah Oil Company v. Harris, 565 P2d 1135 (Utah 1977) in which the Court, after citing the statute in question, said:

> The foregoing clearly appears to have been enacted to safeguard a litigant who finds himself without counsel and prevents further proceedings until he again has counsel or chooses to proceed pro se. (Emphasis added.)

While the earlier decisions remain good law, the later decision suggests that the Court may look beyond the strict language to safeguard a litigant who did not have a reasonable opportunity to obtain other counsel and had not chosen to represent himself.

The statute as construed in the earlier two cases is clearly inapplicable to the case at bar. Taking the broader approach suggested by Utah Oil v. Harris, supra, there is still no procedural problem since the evidence supports the conclusion that defendant had made the choice to represent himself.

Defendant furhter argues that plaintiff's failure to notify defendant to obtain counsel or proceed without counsel violated Rule 2.5 of the Rules of Practice of the District and Circuit Courts of the State of Utah. This Rule contains two

paragraphs, one of which is identical to Sec. 78-51-36, U.C.A., 1953 as amended, and the other of which provides, in pertinent part, as follows:

> When an attorney withdraws as counsel of record, written notice of the withdrawal must be served upon the client of the withdrawing attorney and upon all other parties not in default and a certificate of service must be forthwith filed with the court.

Unlike the statute, the rules do not impose a jurisdictional requirement. Rule 14.4(c) of the same Rules of Practice provides:

> (c) Strict compliance with the foregoing rules may be waived by the court, in its discretion, in order to prevent manifest injustice.

The following quote is illustrative of the purpose of rules of practice:

> . . . (T)here is abundant authority in support of the view that rules of court are but a means to accomplish the ends of justice, and that the court has the power to modify, suspend, or rescind its own rules whenever justice requires it . . . . 21 C.J.S. Courts Section 178.

Such a waiver was obviously made by the trial Court in this instance, and is supported by the evidence. Defendant was aware that he had reneged on a settlement agreement, which agreement resulted in dismissal of the lawsuit (summer, 1980). Defendant was notified of plaintiff's intention to reinstate the matter and have it set for trial (Motion to Reinstate and for Trial Setting, dated December 26, 1980, set for hearing January 7, 1981). Sometime between the time that defendant's counsel withdrew (September 9, 1980) and January 7, 1981, defendant consulted with other counsel, who was not retained. From the time the action was reinstated and set down for trial, defendant had adequate opportunity to contact and retain other counsel, but elected not to do so. Defendant was present personally on January 7, 1981 when the matter was reinstated and set for trial.

The court expressly found that an additional notice from plaintiff to defendant to obtain counsel or proceed pro se would have served no useful purpose and that defendant had made the decision to represent himself (R. 80). The court further expressly found that the defendant was aware that his relationship with his former attorney had terminated, that the matter was going forward and that he was either obliged to obtain counsel or represent himself. The court found that he did the latter (R. 80). The court expressly found that it would be unjust

to impose on plaintiff the necessity of a new trial when at the time of trial there was nothing before the court which would have indicated that the trial should not go forward (R. 80).

In retrospect, defendant may assert that he was not prepared to proceed, but at the time and place fixed for trial, he announced that he was representing himself and that he was ready to proceed. He cross-examined plaintiff's witnesses, called and examined his own witnesses, testified himself and argued his case. He never at any time said or did anything that the trial court could have taken to mean anything other than a conscious decison to proceed pro se, and this was so notwithstanding cautions and recommendations from the Court Clerk and the Court itself.

Defendant's argument states that plaintiff's failure to provide notice to defendant to obtain counsel or proceed without counsel effectively cut off the trial Court's jurisdiction to proceed with any part of the case after the date that defendant's original counsel withdrew. The Rules of Practice of the District and Circuit Courts were adopted pursuant to the authority granted by the Utah Rules of Civil Procedure (U.R.C.P. 83), and, the Rules of Practice must by consistent with the Rules of Civil Procedure. U.R.C.P. 82 provides:

> These Rules shall not be construed to extend or limit the jurisdiction of the courts of this state or the venue of actions therein. (Emphasis added.)

Plaintiff is in agreement with the basic discussion in defendant's brief regarding due process and procedural fairness. Plaintiff's counsel is of the opinion that no response thereto is required for the reason that the facts of the case do not give rise to the application of the concepts discussed. Reduced to bare bones, defendant, with adequate notice and caution, chose to represent himself. There were no surprises sprung, no defaults entered, no declining to afford additional time to prepare or to obtain counsel, no ungranted requests or petitions, and no abuse of discretion. The only thing which defendant requested and did not receive was a non-suit on plaintiff's complaint. This was not a procedural, but a substantive matter, based on the trial court's view of the evidence.

CONCLUSION

The judgment of the trial court should, in all respects, be affirmed.

Respectfully submitted this 12th day of October, 1981.

K. L. McIFF

CERTIFICATE OF SERVICE

I hereby certify that two (2) full, true and correct copies of the above and foregoing BRIEF OF RESPONDENT were placed in the U.S. Mail, first-class postage thereon fully prepaid, on the 12TH day of October, 1981, addressed as follows:

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